LCRO 145/09

CONCERNING An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING a determination of the Auckland Standards Committee 3

BETWEEN **MS WOLVERHAMPTON**

of Auckland

Applicant

And **MR SHAFTESBURY**

of Auckland

Respondent

The names and identifying details of the parties in this decision have been changed.

DECISION

Application for review

[1] On 24 April 2009 Mrs Wolverhampton (the Applicant) complained to the New Zealand law Society that Mr Shaftesbury (the Practitioner) had (a) lost or mislaid a Contracting Out Agreement that he had prepared for her in 2002, and (b) falsely blamed her for its disappearance. Her complaint set out events that had occurred in 2004 when she had contacted the Practitioner's office seeking a copy of it, that it could not then be located, and that she provided a photocopy of the 'half-signed' agreement (i.e. containing only the signatures of her partner and his lawyer).

[2] The complaint was notified to the Practitioner who responded on 3 June 2009, denying the allegation, and alleging that the Applicant was being "deliberately misleading in virtually all material respects". He informed the Standards Committee that the document was last known to be in the possession of the Applicant. He enclosed a copy of a letter sent by his firm in September 2004 to the lawyer who had

acted for her (former) partner, S, in response to an enquiry by that firm which recorded the firm's advice that the Applicant had acknowledged holding both copies and would give one to her partner that day.

[3] On 9 June 2009 the Applicant informed the Standards Committee that she had found the Agreement (one original) in her letter box. She said it had not been posted nor had it been placed in an envelope. The Standards Committee informed the Practitioner accordingly.

[4] The Practitioner wrote again to the Standards Committee on 15 June 2009 challenging the truthfulness of the Applicant's claim that she did not know how the document came to be in her letter box. He contended that she had found the document among her papers and had herself placed it there. He reiterated his earlier stance that the Applicant had the document all along. He sought confirmation that this was the end of the complaint. The letter was sent on to the Applicant. In several further communications with the Standards Committee the Applicant and the Practitioner forwarded further information and submissions, each contesting what the other had written. The Applicant sought compensation from the Practitioner for legal costs she had incurred in trying to assemble evidence of the Agreement's existence, prior to it being found.

[5] The Standards Committee asked the Applicant to provide a copy of the Agreement she had found in her letter box so that the date on which it was shown to have been signed could be matched to the date that the Practitioner advised that the mortgages had been signed. The Applicant was unwilling to provide the full copy of the Agreement. In these circumstances the Standards Committee did not pursue the complaint further and issued its determination declining to uphold the complaint, citing, as reasons, that the Agreement had been found and the Applicant's unwillingness to provide a full copy of the original document. The Committee resolved pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 to take no further action.

Review application

[6] The review application related to both the original complaint, but also to the Applicant's discovery of the original document in her letter box. Although she was initially uncertain about who might have put it there, the substance of the Applicant's contention was that the Practitioner was last known to be in possession of the original documents. She disagreed with the Committee's decision that no further action was necessary because she was significantly out of pocket due to legal costs incurred prior to the document turning up.

Procedure

[7] This review commenced with a hearing on 27 October 2009 attended only by the Applicant, which is a first step enquiry where the information provided appears to the Legal Review Complaints Officer to be insufficient to show that there is a case for a Practitioner to answer. It became apparent in the course of that hearing that the evidence of the parties was in conflict on almost every issue and with respect to almost every detail. In these circumstances it appeared appropriate to hear from the Practitioner and I wrote to the parties on 29 October 2009 referring to "disputed evidence which gives rise to issues of credibility". The parties were invited to consider the possibility of mediation but this was declined and a substantive hearing was then arranged.

[8] I heard from both the Applicant and the Practitioner at a substantive hearing on 13 January 2010. After that hearing the Applicant was asked to provide some further information relating to evidence she had provided at the hearing, and thereafter I arranged for a further meeting with the Practitioner only, to clarify some parts of his earlier evidence and also to give him an opportunity to respond to further information provided by the Applicant. Some further exchanges of information followed. The Practitioner has received a copy of all information forwarded by the Applicant and has had the opportunity to comment.

[9] I mention at this point that at the hearing the Applicant confirmed her reluctance to produce the original Agreement. The reasons were not altogether clear but were understood to relate to current court proceedings which she considered could be compromised by making the document available. Her particular concern surrounded the date that the Agreement was shown to have been signed, which she claimed was incorrect and bore no relationship to the actual date of signing. She had nevertheless provided a photocopy of the front and back pages of the Agreement (but excluding the top of the front page showing the signing date) and this was provided to the Practitioner. The Applicant was willing to allow me to view the original document found in her letterbox but I declined to receive any evidence that could not be placed before the Practitioner, and the Applicant was informed accordingly. I need also mention the Practitioner was equally reluctant to disclose the actual date that the Applicant attended his office to sign the Agreement, also for reasons which were not clear.

Jurisdiction

[10] I record that the Practitioner raised two grounds for challenging the jurisdiction of this office to undertake the review. The first claimed that the Applicant had not lodged her review application within the statutory time frame. The dates were re-checked and the Practitioner was informed that the review application was in fact received by this office on the last day that it could have been accepted, which clearly brought the application within the statutory time frame.

[11] The second ground of challenge related to the Applicant's unwillingness to produce the original Contracting Out Agreement that she said had been placed in her letterbox. The Practitioner considered that this omission was prejudicial to him. I did not accept that this went to the jurisdiction of this office, and ruled accordingly, but I accepted that this was relevant to matters of evidence. The Applicant was again reminded that it was her responsibility to provide sufficient evidence to support her complaint, that failure to produce the original document could limit the enquiry and that inferences could be drawn from her refusal to produce evidence.

Scope of review

[12] Notwithstanding that the original Contracting Out Agreement had been found in the Applicant's letter box I considered that some enquiry should be made into the original complaint alleging that the Practitioner had mislaid the document in 2002. I did not feel constrained to undertake such an enquiry despite the subsequent discovery of the Contracting Out Agreement document, because the complaint related to events preceding that discovery, the Applicant had incurred legal costs in trying to assemble evidence of its existence, and because the evidence forwarded by the parties concerning who last held the documents conflicted in almost every detail.

[13] I informed the Practitioner that the conduct complained of occurred in September 2002, bringing it within the 6 year limit for bringing of complaints. I also informed him that my investigation would focus on the original complaints which were directed at the Practitioner's professional responsibilities in regard to the 2002 legal work he undertook for the Applicant in respect of the Contracting Out Agreement. That is to say, my investigation and review did not extend to considering the question of how the document eventually came to be found in the Applicant's letterbox. The Applicant's reluctance to produce the original document made any such enquiry impossible and she was made fully aware that an enquiry into her complaints would be limited in these circumstances.

Background

[14] The Practitioner had acted for the Applicant in relation to her divorce, and in 2002 she sought his further services in relation to the preparation of a Contracting-Out Agreement (and related refinancing) after she had commenced a de facto relationship with S. The Practitioner drafted the document and sent duplicate copies to S's lawyer who attended to the signing by S and himself as witness, returned them to the Practitioner on 8 October 2002. Soon afterwards the Applicant attended the Practitioner's office to sign the documents. That is as far as the undisputed evidence goes. The following records the different accounts of the Applicant and the Practitioner in relation to the matter of the execution of the documents and subsequent events.

Applicant's account

[15] The Applicant said she attended the Practitioner's office on two occasions. She said that when she attended the Practitioner's office to sign the documents (already signed by S and witnessed by his lawyer) she noticed that the date of the start of the de facto relationship was incorrect. She was unwilling to sign it with the error and said that the Practitioner had allowed her to take the documents home to enable S to make the correction. She said that S put a line through the error and inserted the correct date in his own handwriting, and placed his initials in the margins of the document.

[16] She said that she returned to the Practitioner's office a second time with the documents which were then signed by her and the Practitioner, and initialled against the amendment. She said that both copies of the document remained with the Practitioner when she left the office, and that she understood that they would be forwarded to S's lawyer to initial the amendment as witness, at which time the documents would be finally dated. The Applicant said that she never saw the documents after that time. That is, until one was left in her letterbox some seven years later.

[17] The Applicant and S separated temporarily in around September 2004 and she sought a copy of the Contracting Out Agreement. She said she contacted both S's lawyer and the Practitioner. S's lawyer denied having a copy. The Applicant said that there were several telephone exchanges with the Practitioner's office and that she went to the office to uplift a copy of her Agreement, only the Practitioner's wife being in attendance at that time, who, unable to locate a copy of the original, gave her a photocopy of the 'half-signed' Agreement (i.e. bearing only the signatures of S and his lawyer), assuring the Applicant that the content of the Agreement was identical to the original fully signed version. The Applicant said that she did not pursue the matter further at that time because she and S were reconciled soon afterwards.

[18] When the parties separated permanently in 2008 she again looked for the original Contracting Out Agreement, and said she again contacted both the Practitioner and S's lawyer who both denied holding the document. S's lawyer claimed his client's copy had never been returned to him. The Practitioner wrote to her then current lawyer to advise that his firm had sent a letter to S's lawyer in September 2004 confirming that the Applicant had both copies of the Agreement at that time. The Applicant said this is how she became aware of the letter that the Practitioner's wife had sent to S's lawyer in September 2004. The letter had been written by the Practitioner's wife who had claimed that she (the Applicant) was holding both copies of the Agreement and would give S a copy. The Applicant said she had never had possession of the documents, and had not been sent a copy of that letter. The Applicant denied having acknowledged holding the Agreements in a telephone conversation with the Practitioner's wife (as claimed by the Practitioner); she denied that there had been such a conversation with the Practitioner's wife.

[19] These events led to the Applicant's complaints against the Practitioner to the New Zealand Law Society.

[20] The Applicant said she had no knowledge of how the Agreement had subsequently come into her letter box. After finding it she had sent a copy of the front and back pages to the Standards Committee showing the signatures of the parties.

[21] Subsequent communications concerning the matter (via the Standards Committee) largely centred on how the document could have got into her letterbox. She disputed allegations by the Practitioner that she had discovered the document among her papers and had herself placed it in the letterbox. She eventually came to the view that the Practitioner had very likely put it there or had knowledge of how the document came to be there.

[22] She challenged the Practitioner‘s explanation to the Standards Committee that, had he found the documents he would have had it couriered to her so as to avoid the risk of a law suit. In her view the 21 September 2004 letter that had been sent from the Practitioner's firm claiming her admission to possessing the documents effectively precluded him from subsequently admitting that he had found documents.

[23] Finally the Applicant claimed that the date shown on the document as being the date that it was signed was clearly wrong, and bore no relationship to the timeframe of her instructions to the Practitioner or when she had attended to signing it. She added that the date as shown preceded the actual time frame by about two months.

Practitioner's account

[24] The Practitioner claimed that the Applicant had always been in possession of both copies of the Agreement. His evidence for this claim was the letter written by his wife to S's lawyer on 21 September 2004 following two requests by S's lawyer for his client's copy of the Agreement. The Practitioner said that following an enquiry by S's lawyer in September 2004, his wife (also his practice manager and legal executive) had made a search for the document, and being unable to find it, had telephoned the Applicant who advised her that she (the Applicant) held both copies of the document and would give S a copy that day. He said this led his wife to write to S's lawyer as follows:

> "*I apologise for the delay in replying.* [The Applicant] *is holding your client's copy of the Contracting Out Agreement and has arranged for your client to uplift this from her today."*

[25] The Practitioner said that nothing further was heard thereafter from either the S's law firm, or from the Applicant. He provided a copy of his telephone records of the time that showed a 5 minute call had been made to the Applicant.

[26] The Practitioner disputed the Applicant's version of the September 2004 enquiry events in every respect. He denied she had visited his office at that time, and denied that his wife had given the Applicant a copy of a half-signed Agreement. He considered the September letter to be proof of what had happened. The Practitioner said that S had confirmed to him that he (S) had followed up on the 21 September letter and asked the Applicant for his copy, but could not recall whether he was given a copy. The Practitioner's wife (also interviewed) also denied that the Applicant had attended their office or that any 'half-signed' agreement had been given by her to the Applicant.

[27] The Practitioner asserted that the Applicant had attended his office on one occasion only. He offered various explanations about how the documents had come to be in the possession of the Applicant. He originally questioned whether they had been signed at all, having noted that there was nothing on his file to show that they had been signed, and he informed the Committee that there was no mention of the Contracting Out Agreement on the bill of costs he had sent. He had also informed the Standards Committee that the signing of the Agreement would have been at the same time as mortgage documents were signed, this being 14 October 2002. He variously speculated whether the Applicant had taken the documents without his knowledge, perhaps having been allowed to do so by a secretary, or had taken the documents home for her partner to make and/or initial the amendment and never returned them.

[28] When asked to explain how his witnessing signature came to appear in the margin against the amendment, he submitted that the amendment had been made when the Applicant attended his office, at which time all the signing, including the initials, was done. He first disputed that the amendment had been made by S, speculating that it may have been done by the Applicant herself, or perhaps a member of his firm, after which the Applicant would have taken both copies of the documents with her, probably with his agreement, to obtain S's initial against the amendment. When subsequently the Practitioner was given a sample of S's handwriting, (indicating that S had made the amendment) he submitted that he would have initialled the margin in anticipation of S later correcting the error when the Applicant took the documents home with her after their signatures had been done.

[29] In the Practitioner's view, because the Applicant had visited his office only once, the only possible explanation for the Applicant having had the documents in her possession was that she had taken them with her after they were signed at his office, and that they had never been returned to him. He said he was trying to piece together what had occurred at that time. He noted that the initials of the Applicant and S appeared in both the right and left margins, and that his own initial appeared only in the left margin, which indicted to him that the initialling had been done at different times. He suggested that he would have initialled the deletion of the wrong date, and likely allowed the Applicant to take the documents home with her to have S complete the correction and initial it. He repeatedly challenged the truthfulness of the Applicant's account of events.

[30] The Practitioner submitted had he discovered the documents in his office (as alleged by the Applicant) it would have been in his interests to immediately forward a copy to the Applicant given his exposure to legal suit.

[31] The Practitioner considers himself to be significantly prejudiced in this disciplinary forum by the fact that no copy of either of the original Agreements have been provided to him, despite his requests. He denies that he is in breach of any obligation owed to the Applicant.

Intervening events

[32] There were a number of (unrelated) delays in completing this decision and in the intervening time other information came to light. I was informed that in respect of the current court proceedings between the Applicant and S that the Applicant had produced to S a copy of the document she found in her letter box. More recently the Practitioner wrote that following a visit by S he learned that S recently discovered, at

his father's home, a copy of the original Contracting Out Agreement. The Practitioner considered this supported his evidence that the Applicant had possession of the documents all the time.

[33] A copy of the Practitioner's letter was sent to the Applicant for comment who confirmed that she had produced to S a copy of the Contracting Out Agreement she had found in her letter box. She expressed her concerns about the contact between S and the Practitioner, of which she had been unaware. She said she had learned that S's current lawyer had sought S's permission to contact the Practitioner (enclosed was a copy of an emailed request by that lawyer to the Practitioner), and also expressed her concern about the propriety of the contact between S's lawyer and the Practitioner since 8 August 2009.

[34] The Applicant queried the timing and convenience of the meeting between the Practitioner and S, and S's claim to have found a copy of the Agreement in his father's house, stating her true belief to be that S acquired his copy from the Practitioner. In reply the Practitioner denied that he had given S a copy of the Agreement. He defended his contact with S (who he said had *"unexpectedly called at my office..."*) on the basis that he had the right to defend allegations made against him, and that his enquiry related to whether S had ever received a copy of the Agreement. He said that as a result of that contact with S he learned that S had belatedly found a copy of the Agreement at his father's house. The Practitioner further alleged that S had told him that the Applicant had suggested to S that he join her in her compensatory claim against the Practitioner.

[35] As the months have passed I am acutely conscious of the fact that this investigation and review, far from being concluded, appears to be expanding. I am also aware that the recent concerns that have been expressed, while arising out of the original complaint, are not directly pertinent to that complaint which alleged that the Practitioner had mislaid her Agreement in 2002. I am also aware that both parties are awaiting the outcome of my review and further delays are unfair on both parties.

[36] I need only express my own concerns about the twists and turns in the matters that have risen in the course of my enquiry, and that this investigation cannot address many of these issues. In the circumstances I have decided to confine my investigation to the original complaint and to leave it to the Applicant to lodge such further complaints to the New Zealand Law Society as she considers appropriate, which would be the subject of a separate enquiry. Within the confines of the scope of this review I

do not consider that the Practitioner is prejudiced by not having a copy of the original Agreement produced to him for reasons that shall become evident.

The enquiry and the evidence

[37] This investigation has been characterised by conflicting evidence where the evidence of the parties is diametrically opposed in almost every particular. This has made the enquiry exceedingly difficult. However, the narrow focus of my investigation, that being the question of whether the Practitioner discharged his professional obligations in 2002 and thereafter, has allowed me to reach some conclusions on the matter. The following discussion sets out reasons for my conclusion that the Practitioner failed to discharge his professional obligation to the Applicant in relation to safeguarding the Contracting Out Agreement.

[38] For the purpose of my investigation I accept that the document located in the Applicant's letter box is in fact the same document that was prepared by the Practitioner. I have compared it to the half-signed version that had been signed only by the Applicant's partner and witnessed by his lawyer and can find no differences, other than it is at different stages of being executed. While I have sighted photocopies only I have no reason to doubt that they are true representations of the originals and I accept that they are so.

[39] I begin with the Agreement itself. It was clearly amended in one respect. In the "Background" recitals the date shown as being the commencement of the de facto relationship was originally typed in as 26 September 2001. This was amended to 12 July 2002 by hand in capital letters of a distinctive block style. The Applicant had claimed that the amendment was made by S and she provided an sample of his handwriting in the form of a card that he had given to her some years ago. A copy was given to the Practitioner who did not raise a serious challenge. The handwriting is sufficiently distinctive to allow me to conclude with some confidence that the same person wrote both, and I accept that this person was the Applicant's former partner, S.

[40] Against S's amendment in both right and left margins appears the initials of the Applicant and S; the Practitioner's initial appears only in the left margin. Missing, is the witnessing initial of S's lawyer which I mention because it is a pivotal part of the Applicant's evidence in explaining the sequence of events concerning the original documents. The Practitioner submitted that the fact his initial appears in only one margin indicates that the amendment was made in two stages. His explanation was

that the original date would have been crossed out in his office and initialled by himself and the Applicant in the left margin, that the Applicant would then have taken the documents home for S to amend the relationship commencement date and that S would have initialled both margins with the Applicant adding her own initials to those of S in the right margin. He submitted that he would have placed his witnessing initial in the margin before the correct date was inserted, in anticipation that it would be done subsequently. He said he would have agreed to release the fully signed documents to the Applicant for S's correction and signature but not for the purpose of retention, adding that the Applicant had never returned the documents to him. He speculated whether S intended to take them to his lawyer. The Applicant's explanation is that on discovering the error she took the half-signed documents home with the Practitioner's consent, had S make the correction and add his initials, and that the signing by her and the Practitioner (including initialling) had occurred on a second visit.

[41] It is not possible to know for certain what happened in this case. However, I do not think it unreasonable to consider the matter in the light of what would be acceptable legal practice in the circumstances. First, I find it unlikely that a lawyer would bear witness in a document to a correction yet to be made. To do so would be highly risky. I find it more likely than not that S's amendment and initials were already in the document when the Practitioner placed his initials in the left margin. This could only have happened if the Applicant had taken the documents home (after the first visit to the Practitioner's office) for the amendment to be made by S, and then returned with them to the Practitioner's office a second time. (It is undisputed that S never visited the Practitioner's office). I do not give particular weight to the Practitioner having initialled the margin on one side only as it was not necessarily required and there could be several explanations for this.

[42] Second, I find it unlikely that a lawyer would agree to a client taking away original documents that are almost fully executed without recording the fact of the client having taken them and without first taking a photocopy. No such documentation exists.

[43] Third, had events occurred as the Practitioner described I would have expected there to be some evidence of follow-up by the Practitioner concerning the Agreement, either to seek the return of them from the Applicant, or at least to ensure that they had been forwarded to S's lawyer. Or, if he had understood that the Applicant (or S) would give the documents to S's lawyer to add his witnessing initial, it could reasonably be expected that the Practitioner would have informed S's lawyer accordingly. There is no evidence of any of these steps having been taken by the Practitioner. He explained that things became complicated when the Applicant later sought further legal services

from S's lawyer. Be that as it may, given that the Practitioner had legal responsibilities to conclude his own instructions and to account to S's lawyer for his client's copy of the Agreement, it is surprising that there is simply no record of any kind about the documents after they were signed.

[44] From all of the circumstances I have concluded that it is more likely than not that at the time of her first visit to the Practitioner's office (intending to sign the documents but noting the error) the Applicant took both copies of the Agreement home so that her partner could make the correction, (he already having signed the document in duplicate), that the Applicant returned to the Practitioner's office a second time when they both then signed and initialled the Agreement. This fits with the evidence of the document itself, and accords with the Applicant's account of events. The absence of any of information concerning or affecting the documents suggests to me that the documents remained with the Practitioner after he and the Applicant had signed them. Evidence was also given about the limited timeframe for signing because the Agreement was linked to a refinancing transaction. It seems most likely that in those circumstances the Practitioner would have been agreeable to the Applicant taking the documents home for the correction to be made by S and a high likelihood they would be returned given that the Agreement mainly benefitted the Applicant.

[45] I also considered what circumstances might reasonably support the Practitioner's version of events. If both copies of the Agreement had been taken by the Applicant after signing, it would have been exceedingly unlikely that she would have done nothing further to ensure the documents were completed with the witnessing initial of S's lawyer, whether this would have been done via the Practitioner or by forwarding the documents to S's lawyer.

[46] There was other evidence which led to me question the Practitioner's recollection of events. I refer to the Practitioner's 2002 appointments diary and his file on the matter, both of which I was able to examine. The Practitioner had informed the Standards Committee that the Applicant had attended his office on 14 October 2002 to sign the refinancing documents and that she would then also have signed the Agreement. No appointment for the Applicant appears in the diary on that date. There is, however, another date showing an appointment for the Applicant, (the Practitioner did not wish this date to be disclosed) being a short time after S's lawyer had returned the documents to the Practitioner on 8 October 2002. The Practitioner said that was when the Applicant had signed the Agreement. There was a further appointment entry one week after the Applicant's scheduled appointment, which is crossed out in somewhat heavy pen and in a dense criss-cross fashion making identification of the

original entry virtually impossible. The explanation given by the Practitioner's wife was that the client whose name appeared immediately above had changed his appointment. I noted that that client had also apparently changed the appointment again, as shown by simple lines through that name. I do not draw any inference from the obscured entry, and only note that most other instances of a cancelled appointment are shown by way of simpler deletion such as a line through a name.

[47] In other respects also the diary was unhelpful. I noted that the bill of costs in the file (dated 8 November 2002) recorded attendances by the Applicant on the date of 2nd September, 27th September and 23rd October 2008. The 2002 diary showed the 27th September to be a Sunday, and there is no record in the diary of an attendance by the Applicant on 23rd October. There is also no record of an attendance by the Applicant on 14th October 2002, this being the date that the Practitioner had advised the Standards Committee had been the date that all documents were signed. The Practitioner was unable to explain these discrepancies, and said that the bill of costs was prepared by another staff member. Moreover, none of the above dates matched the date shown in the diary for the Applicant's October appointment.

[48] The Practitioner explained that some parts of his file had been sent to the Applicant's new lawyer but there remained evidence of attendances by the Applicant. I noted that the only bill of costs on the Practitioner's file (referred to above) was headed with a reference to the Contracting Out Agreement and refinancing, but no mention is made of the Contracting Out Agreement in the general narration. This seems surprising given that the Practitioner had drafted the Agreement, liaised with S's lawyer in relation to it, and had attended on the Applicant signing the documents. In any event little clarification was offered by the Practitioner's own records, and his diary could not be considered a reliable indicator of the Applicant's attendance/s at the Practitioner's office.

[49] Having considered all of the information it is reasonable to conclude that the last known location of the documents was at the Practitioner's office after he and the Applicant signed them towards the end of 2002. Assuming all signatures (bar the initial of S's lawyer) were in place at the second visit, there would have been no reason for the documents to then have been taken by the Applicant after they were signed, and I have noted there is no evidence that she did so. The documents were then only awaiting the initial of S's lawyer against his amendment, and ought to have been sent to him at that time. Clearly they were not, as demonstrated by the absence of the witnessing initial of S's lawyer and that lawyer's enquiry in 2004 seeking his client's copy of the Agreement.

[50] The Practitioner seeks to defend himself on the basis of the record of the 21 September 2004 letter which he considers to be proof by what it stated. I have not overlooked his information that S confirmed having made enquiries with the Applicant following the 21 September 2004 letter. However, I have also noted that the Practitioner's claim in that letter is disputed by the Applicant; I am also mindful that the Applicant's evidence (before the Agreement was found) referred to S having questioned whether the Agreement had ever been signed. I have not sought any evidence from S as I understand that he and the Applicant are involved on opposite sides of a civil dispute. To pursue these matters further would require a prolongation of this investigation and extending it to include enquiry into matters beyond the scope of my present investigation.

[51] Had a copy of the 21 September letter been sent to the Applicant, any confusion would very likely have been addressed then. It may be considered surprising that the Practitioner (or his wife in this case) had written to S's lawyer without forwarding a copy of that letter to the Applicant, a step that a prudent lawyer would have taken. The Practitioner submitted to the Standards Committee that the Applicant could readily have come to learn of that letter and could then have challenged its accuracy had she considered it appropriate to do so, adding that there was nothing to gain by not having accurately recorded what had happened. I understand the intention of this submission but it may have also been the case that this complaint would have arisen earlier. The Practitioner's telephone record does not conclusively resolve the matter either, since the Applicant also referred to several telephone exchanges between them during that 2004 episode.

[52] I return to the original complaint which alleged that the Practitioner had mislaid the Contracting Out Agreements and had falsely accused her for their disappearance. I have stated my reasons for the most likely view being that the documents were most likely left with the Practitioner after they were signed by the parties in 2002.

[53] In any event, whether or not that conclusion is correct is less material than the absence of any information leading to the whereabouts of the documents. I proceed from the recognition that the Practitioner had the responsibility of showing that he had discharged his professional obligations with regard to completing the retainer and accounting for the documents. That is to say, the onus fell on him to show that he had discharged his professional obligations to the Applicant in relation to the legal services he was providing. In the absence of any evidence to clarify with any degree of certainty what became of the documents I can conclude with a degree of confidence

that the Practitioner failed to discharge the evidential burden required of him in this matter.

[54] The Practitioner contended that the Applicant had possession of the documents. The onus was on him to provide evidence of this claim. There is no uncontested evidence to show that the Applicant took them away in 2002. The Practitioner relies on the 21 September 2004 letter as being proof of its content, which, he states, was borne out by the fact that the Applicant discovered one of the original copies in her letter box, he maintaining she had it all along. Given that every claim made by the Practitioner is disputed by the Applicant, I must consider that the letter can do no more than evidence the fact it was written, and I do not consider that it provides an unequivocal answer to the questions surrounding what became of the Agreement between 2002 and when it was discovered in the Applicant's letterbox in 2009.

[55] The Practitioner had a professional responsibility for completing instructions, and where these include documents to be prepared and signed, that obligation included safeguarding those documents for the client, and ensuring a copy was provided to any third party entitled to it. This finding may seem harsh to the Practitioner but is inevitable given the absence of clear evidence that he discharged his professional obligations.

Applicable standard

[56] This review concerns conduct which occurred prior to 1 August 2008. Pursuant to s 351 of the Lawyers and Conveyancers Act 2006 a complaint against a practitioner in respect of conduct which occurred prior to 1 August 2008 may only be considered by the Committee if it would have justified disciplinary action on the basis of the standards applicable at that time. Once the threshold of s 351 is met a Committee may then turn to consider whether a determination against the practitioner ought to be made. Only a finding of "unsatisfactory conduct" could then be made, and then only if the standards set out in section 12 of the Lawyers and Conveyancers Act 2006 are breached. That section encompasses subsection (b) which refer to the conduct of a lawyer *"...that occurs at the time he or she is providing regulated services and is conduct that would be regarded by lawyers of good standing to be unacceptable, including (a) conduct unbecoming a lawyer and (ii) unprofessional conduct.*" In this case the Standards Committee exercised its discretion to take no further action, and the Committee did not therefore consider the question of whether the threshold of conduct under the Law Practitioners Act 1982 was met. Having reached a different conclusion from that of the Committee, it is necessary to determine whether the conduct falls within section 12(b)

of the Lawyers and Conveyancers Act. I must consider whether the conduct is issue amounts to "*conduct unbecoming*."

[57] It is not necessary to tie a finding of unsatisfactory conduct or conduct unbecoming to a breach of a particular rule, and the question may be considered more globally as one of whether, when all of the circumstances are taken into account, the Practitioner's conduct was such as to be *"conduct that would be regarded by lawyers of good standing as being unacceptable*", whether as 'conduct unbecoming' or 'unprofessional conduct.' In the context of professional standards the test turned on whether the conduct is acceptable according to the standards of "*competent, ethical, and responsible practitioners*" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811). For negligence to amount to a professional breach the standard found in s 106 and 112 of the Law Practitioners Act must be breached. That standard is that:

> the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

[58] Undoubtedly the loss or misplacement of important documents is a serious matter that could have had potentially disastrous consequences for the Applicant (and the Practitioner), but this case is not only about missing documents which were later found. Taken as a whole, the Practitioner's approach towards his professional responsibilities in this matter amounted to an accumulation of negligent acts which, demonstrated a careless disregard on his part in meeting his responsibilities, not only in relation to the events in 2002 in failing to have properly completed the work he had undertaken, but also later in 2004 when, discovering that he was unable to account for the documents, his response was equally inadequate in addressing his earlier omissions and bringing the matter to a satisfactory conclusion. There is no evidence of any follow through by the Practitioner either in 2002, or later in 2004, in relation to completing his instructions with regard to the Agreements, seeking or obtaining confirmation of the security of documents that he had the responsibility for, and overall reflected a casual carelessness in the manner in which he approached his professional obligations throughout. With these omissions the Practitioner failed to meet his professional obligations to the Applicant, and are circumstances on which a finding of conduct unbecoming may properly be made.

[59] I find that the Practitioner failed to meet the standard of conduct required of a competent and responsible practitioner, and this failing amounted to conduct unbecoming and could have led to disciplinary proceedings against him under the Law

Practitioners Act 1982. It also meets the statutory threshold of s 351 for a finding of unsatisfactory conduct to be made pursuant to section 12 of the Lawyers and Conveyancers Act 2006. I find that the Practitioner is guilty of unsatisfactory conduct.

Orders

[60] Section 352 of the Lawyers and Conveyancers Act 2006 provides that if a complaint is made under this Act about conduct that occurred before the commencement of this section, any penalty imposed in respect of that conduct must be a penalty that could have been imposed in respect of conduct at the time when that conduct occurred. The range of possible orders that could have been made under that Act are set out in 106 of the Law Practitioners Act.

[61] The Applicant has sought compensation for costs she incurred as a result of her attempts to prove the existence of the Contracting Out Agreement, prior to it landing in her letter box. A compensatory order can made under Section 106 (4)(e) of the Law Practitioners Act which provides:

> "where it appears to the Tribunal that any person has suffered loss by reason of any act or omission of the practitioner, the practitioner may be ordered to pay to that person such sum by way of compensation as specified in the order, being a sum not exceeding such amount as may from time to time be fixed for the purpose of this paragraph by resolution of the Council of the New Zealand Law Society."

[62] At the time that the conduct occurred a compensatory order could not exceed $5,000. The causative link between the conduct of the lawyer and the loss is expressed somewhat loosely in terms of the loss being suffered "by reason of any act or omission" of the lawyer. In this case the Practitioner has been found to have breached the required standard of professional conduct and it is appropriate to interpret the words of the Act consistently with the principles of causation that the Court would apply in such a case. It is not open for the Applicant to claim every expense that arose out of the matter; it must be shown that the losses claimed arose from the breach by the Practitioner of his obligations, and would not have arisen but for that breach.

[63] The Applicant originally claimed compensation of $3,000 for legal costs she incurred in attempting to prove that the Agreement in fact existed. She first became aware of concerns over the whereabouts of the Contracting Out Agreement on 9 April 2009 after receiving a copy of the Practitioner's letter to her lawyer. I accept that she incurred legal costs as a result of her attempts to establish the existence of the Agreement, until she discovered one original document in her letter box on 9 June 2009. The Applicant has provided invoices relating to that period which show the

steps taken by her lawyer in connection with these matters. One invoice is for the sum of $1,595 (inc) and this appears to relate to costs claimed in connection with this matter. The other invoice extends beyond the timeframe I am considering, and includes costs for unrelated matters. Making an appropriate allowance I consider that half that bill should be recoverable by the Applicant, that being $347.50. This reaches a total of $1,942.0 (inc). I am satisfied that these costs were incurred for the purpose of trying to prove the existence of the Agreement and will make a compensatory order accordingly.

[64] I consider it appropriate to censure the Practitioner and an order will be made accordingly.

Costs

[65] Where a finding of unsatisfactory conduct is made or upheld against a practitioner on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case. The enquiry has involved considerable factual complexity and several steps were required in the investigative process. The Costs Orders Guidelines of this office indicate that in such cases an order of $2400 would usually be made which is half of the estimated actual costs of conducting such a hearing. In all of the circumstances I consider it appropriate to make a costs order for $2,000.

Decision

[66] This application for review is upheld. Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Auckland Standards Committee 3 is reversed.

Orders

The following orders are made pursuant to section 156(1) of the Lawyers and Conveyancers Act 2006:

(a) The Practitioner is to pay to the Applicant compensation in total sum of $1,942.0. This sum is to be paid to the Applicant within 30 days of the date of this decision.

(b) The Practitioner is censured

The following order is made pursuant to section 210(3) of the Lawyers and Conveyancers Act 2006:

The Practitioner is to pay $2000 in respect of the costs incurred in conducting this review. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 23rd day of June 2010

Hanneke Bouchier
Legal Complaints review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms Wolverhampton as the Applicant
Mr Shaftesbury as the Respondent
The Auckland Standards Committee 3
The New Zealand Law Society